

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

PENDLETON HEIGHTS GAY-STRAIGHT
ALLIANCE, an unincorporated association,

Plaintiff,

Case No: 1:21-cv-02480-JRS-TAB

v.

SOUTH MADISON COMMUNITY SCHOOL
CORPORATION; PRINCIPAL, PENDLETON
HEIGHTS HIGH SCHOOL, in her official
capacity,

Defendants.

**DEFENDANTS' BRIEF IN OPPOSITION TO
PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

I. Introduction

The Pendleton Heights Gay Straight Alliance (the "GSA") is permitted to meet at Pendleton Heights High School. Neither the GSA, nor any other club, has been denied an opportunity to meet based on the religious, political, philosophical, or other content of the group's activity. This case is not about the denial of access to the facility to meet. Rather, this case is about what groups must be given access to advertise on school bulletin boards, be permitted to advertise on afternoon announcements during instructional time, and to be listed in the Student Handbook. The GSA argues that it has not been provided equal access to such means of publicity as is given to non-curriculum related groups or clubs.

The GSA wrongly claims it has been denied access to publicity by South Madison Community School Corporation ("School") because "when it comes to issues concerning gay, lesbian, transgender, non-binary, and similar persons, the School must remain neutral." [[Filing No.](#)

[10, at ECF p. 4.](#)] That statement has never been made by the School. The GSA ignores the true reason provided by the School as to why the GSA – and other groups such as FCA and the Rugby Club – cannot hang notices on the bulletin boards or be included in the afternoon announcements. The School has repeatedly advised the GSA and other groups, that the bulletin boards and afternoon announcements are only to be used by corporation-sponsored clubs, which are by definition directly related to the curriculum of the School. The GSA is not such a club and has not petitioned to be approved as such a club.

The GSA’s argument is based on the presumption that Best Buddies, SADD, Outdoor Adventure Club, Robotics, Esports, and Bring Change to Mind¹ are non-curriculum related clubs. However, each of those clubs relate directly to subject matter taught at the School, or to the School’s composite courses of study. As such, each club is a Corporation-Sponsored Club, unlike the GSA.

The GSA filed its Motion for a Preliminary Injunction seeking an order requiring the School to list the GSA in the Student Handbook and to give the GSA access to bulletin boards, radio announcements, and other means of publicity. The GSA’s request asks this Court to order the School to provide the GSA access to publicity within the High School which is not granted to other non-corporation sponsored clubs. In short, the GSA is not asking for equal access, but is asking for special access.

¹ The GSA’s Brief also includes “Mat Maids” in its list of non-curriculum-based groups. However, Mat Maids is not a club or organization at Pendleton Heights High School. During the course of this litigation, the School discovered the Mat Maids was still listed in the Student Handbook but that was an error or oversight. No such club exists or is publicized at the School.

II. Facts

A. The GSA

The GSA has existed at Pendleton Heights High School since at least 2013 and its exact date of origin is not documented. [\[Ex. A, Dr. Hall Email\]](#) Groups like GSA are useful to students' mental health and normalize LGBTQ and transgender persons and issues. [\[Ex. B, Rickert Depo. 62:16-23.\]](#) The Pendleton Heights GSA has struggled to provide a continuity of leadership or activity from year to year and has often dwindled to the point of near non-existence. [\[Ex. B, Rickert Depo. 63:16-25.\]](#)

B. Corporation Sponsored and Non-corporation Sponsored Clubs

The School has corporation sponsored and non-corporation sponsored clubs, which are sometimes casually referred to as official and unofficial clubs. [\[Ex. B, Rickert Depo. 57:1-4\]](#) Corporation-sponsored clubs are intended to provide "diversity of learning experiences, including those that are not conducted in a regular classroom but are directly related to the curriculum." [\[Ex. C, Policy 2430\]](#) "The purpose of curricular-related activities [is] to enable students to explore a wider range of individual interests than may be available in the Corporation's courses of study but are directly related to accomplishing the core goals for students...." [\[Ex. C, Policy 2430\]](#) The key element of any corporation-sponsored club is the curricular-related nature of the club. The Policy defines "curricular-related activities" as those activities in which:

- A. The subject matter is actually taught or will be taught in a regularly offered course;
- B. The subject matter concerns the Corporation's composite courses of study;
- C. Participation is required for a particular course;
- D. Participation results in academic credit.

[\[Ex. C, Policy 2430.\]](#) While many activities or clubs may meet the requirements, for a curricular-related activity to be considered “under the sponsorship of [the] Board [] it [must] meets one or more of the criteria stated above *and* has been approved by the Superintendent.” *Id.* (emphasis added).

Corporation sponsored activities and clubs are allowed to advertise on bulletin boards and school announcements, and are allowed to fundraise within the School, and are listed in the Student Handbook. [\[Ex. B, Rickert Depo. 23\]](#) Otherwise, there is no difference in the access provided to corporation-sponsored activities and clubs and non-corporation-sponsored activities and clubs. [\[Ex. B, Rickert Depo. 23-24.\]](#)

GSA is not a corporation-sponsored club; it has not submitted a proposal to be considered or approved for sponsorship. [\[Ex. D, Axel-Adams Depo. 32:25–33:2; Ex. B, Rickert Depo. 65:13-20\]](#) Similarly, neither FCA nor Mat Maids, both referenced in the GSA’s Brief, are corporation-sponsored clubs. [\[Ex. B, Rickert Depo. 23:3-4; 46:14-18\]](#) However the following clubs mentioned in the GSA’s Brief are corporation-sponsored clubs: Best Buddies, SADD, Outdoor Adventure Club, Robotics, and Bring Change to Mind. [\[Ex. E, Ashley Zukowski Affidavit; Ex. F, Branden Jessie Affidavit; Ex. G, Bryan Waltermire Affidavit; Ex. H, Eileen Neeley Affidavit; Ex. I, Samson Hunckler Affidavit.\]](#)

C. Explanation to the GSA as to why they cannot use the bulletin boards or the afternoon announcements.

On September 7, 2021, the GSA asked for permission to hang flyers around the School, advertising the date and time of its call out meeting. [\[Ex. J, GSA Email Communications.\]](#) That request was denied because the Principal took a “neutral stance” which she explained meant that there was “no advertising for any outside organization such as GSA, Pendleton Rugby, etc.” [\[Ex.](#)

[J, GSA Email Communications.](#)] The following day, the GSA asked to have a message included in the afternoon announcements to advise of the date and time of the GSA’s call out meeting. [\[Ex. J, GSA Email Communications.\]](#) The School Principal denied the request and again explained that advertising on the announcements was reserved for “PHHS EAC” [Pendleton Heights Extracurricular Activities], not other organizations or clubs. [\[Ex. J, GSA Email Communications; Ex. B, Rickert Depo.59:8-18.\]](#)

The Principal explained that the line must be drawn between those curricular and non-curricular organizations when it comes to announcements, and if she let one non-curricular club advertise, she would have to let all non-curricular clubs advertise.² [\[Ex. J, GSA Email Communications.\]](#) The School Principal advised that when she used the term “neutral stance” she was stating, “I don’t get to pick and choose which outside organizations get to be on our announcements. So, if I pick one, I would have to pick all. So, I choose not to pick any and remain neutral” to all non-curricular organizations. [\[Ex. B, Rickert Depo 56:7-25\]](#) The “neutral stance” was not based on the content of any club meeting, and the Principal repeatedly let the GSA know that the Pendleton Rugby Club – which does not “concern[]gay, lesbian, transgender, non-binary, and similar persons” (as Axel-Adams claims in his Declaration is the basis for denying access) – is also not allowed to advertise because it is not a curricular-related club. [\[Ex. J, GSA Email Communications.\]](#)

D. Indiana State Board of Education Standards

² The afternoon announcements are played during instruction time at the beginning of 7th period. [\[Ex. D, Axel-Adams Depo.14:11.\]](#) The announcements are very short, lasting only 2-3 minutes. [\[Ex. D, Axel-Adams Depo. 14:19-20.\]](#)

To graduate from high school, Indiana students must do more than just meet a course and credit requirement. *See* INDIANA STATE BOARD OF EDUCATION, *Graduation Pathways Policy Guidance* (finalized July 11, 2018); <https://www.in.gov/doe/students/graduation-pathways/> at A-1. Students must also (a) learn and demonstrate employability skills and (b) show postsecondary-ready competencies. *Id.* Beginning with the 2019-2020 school year, all Indiana Schools were required to implement into the curriculum “Indiana’s Employability Skills Standards” as adopted by the Indiana Department of Education. Students in the graduating class of 2023 must satisfy at least one option *from each of the three* boxes below to graduate. *Id.*

Graduation Requirements	Graduation Pathway Options
1) High School Diploma (Students must complete the course requirements of one of the following.)	<ul style="list-style-type: none"> • Core 40 designation; • Academic Honors designation; • Technical Honors designation; • General designation.
2) Learn and Demonstrate Employability Skills (Students must complete <u>at least one</u> of the following.)	Learn employability skills standards through locally developed programs. Employability skills are demonstrated by <u>one</u> the following: <ul style="list-style-type: none"> • Project-Based Learning Experience; OR • Service-Based Learning Experience; OR • Work-Based Learning Experience.
3) Postsecondary-Ready Competencies (Students must complete <u>at least one</u> of the following.)	<ul style="list-style-type: none"> • Honors Designation: Fulfill all requirements of either the Academic or Technical Honors designation; OR • ACT: College-ready benchmarks; OR • SAT: College-ready benchmarks; OR • ASVAB: Earn at least a minimum AFQT score to qualify for placement into one of the branches of the US military; OR • State- and Industry-recognized Credential or Certification; OR • Federally-recognized Apprenticeship; OR • Career-Technical Education Concentrator: Must earn a C <u>average</u> in at least two non-duplicative advanced courses (courses beyond an introductory course) within a particular program or program of study; OR • AP/IB/Dual Credit/Cambridge International courses or CLEP Exams: Must earn a C <u>average</u> or higher in at least three courses; OR • Locally Created Pathway that meets the framework from and earns the approval of the State Board of Education.

To satisfy the “Service Based Learning Experience Pathway” a student can participate in a co-curricular or extracurricular activity or sport. *Id.* at Section b-7. Students must be “engaged in these activities meaningfully,” and the activities must have school validation. *Id.* “Schools and Districts have the local decision making authority if club sports or activities outside-of-school can fulfill this requirement.” *Id.* To count towards the Service Based Learning Experience pathway, the “sport, co-curricular, or extracurricular activity cannot be something students just participate in because they are required to do so.” *Id.* The Indiana Department of Education has determined that the following extracurricular activities have service as one of their primary objectives, which allow students to be engaged both in school-based activity and meaningful service”:

<ul style="list-style-type: none"> • 4-H • Beta Club • Big Brothers/Big Sisters • Distributive Education Clubs of America • Eagle Scouts • Family, Career, Community Leaders of America • Future Farmers of America 	<ul style="list-style-type: none"> • Health Occupation Students of America • Key Club • Peer Educating Peers (P.E.P) • SkillsUSA • Students Against Destructive Decisions • Student Council/Student Government • VOICE
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Id.

For each Service Based Learning Experience a “teacher, counselor, principal, school, and district have the responsibility to ensure that each experience is meaningful for the student, adheres to the design principles, and is high-quality.” *Id.* “Simply signing up for an activity or participating once does not satisfy this requirement.” *Id.*

E. Curriculum-relatedness of clubs and activities identified by GSA

1. Best Buddies

Best Buddies is a corporation-sponsored club that allows students to learn and demonstrate employability skills through service-based learning experiences. [[Ex. B, Rickert Depo. 27:15.](#)]

General education students in Best Buddies provide mentoring services to essential skills students. [\[Ex. B, Rickert Depo. 29:21-24.\]](#) The students of Best Buddies plan, organize, and implement five programs or events. [\[Ex. B, Rickert Depo. 30:20.\]](#) Those events include a Thanksgiving Dinner, a “Respect Walk,” a Pacer Game outing, a Friendship Walk with all of Indiana, and United Champions. For each event, the students are required to plan, organize, implement, participate in, and execute the event. For the Thanksgiving meal, the students in Best Buddies must plan the menu, create the shopping list, organize the meal preparation, and prepare each dish with the essential skills students. [\[Ex. B, Rickert Depo. 29:25-30:7; Ex. K, Riley Herrin Affidavit.\]](#) For the Pacers game outing, the general education students must work with the essential skills students to coordinate group attendance, set a schedule and plan for getting to and from the game, and execute that plan with the essential skills students. *Id.* For the Respect Walk and Friendship Walk, the students must organize both events including creating and following a timeline for the preparation for and execution of the event. *Id.* The students are responsible for executing the details of the event - from communicating with the community and Best Buddies national headquarters about the event - to selling concessions the day of the event. *Id.* For the Unified Champions event, the general education students organize athletic events for the essential skills students, assist in getting the essential skills students to the correct location and event, assist the essential skills students with being able to complete the event, and timing the event. *Id.*

The activities performed by the students in Best Buddies satisfy the Service Based Learning Experience, which is one way for a student to satisfy the graduation requirement to “Learn and Demonstrate Employability Skills.” *Id.* If the students meaningfully engage and participate in the activities, the Best Buddies Sponsor certifies that the student has satisfied the Employability Skills requirement for graduation. *Id.* and [\[Ex. B, Rickert Depo. 27:20-28:14\]](#).

2. *Students Against Destructive Decisions (SADD)*

Students Against Destructive Decisions (“SADD”) is a corporation-sponsored student organization that promotes making good choices and a healthy lifestyle. [[Ex. E, Ashley Zukowski Affidavit](#).] Students participate in activities including peer to peer events and presentations to the teachers and elementary students. *Id.* Student members of SADD provide educational programs and community-based projects addressing risky behaviors such as substance abuse, texting while driving, and relationships with peers through online activity. *Id.*; *See also* [[Ex. B, Rickert Depo 41:10-14](#).] Students in SADD learn about a health and/or interpersonal relations topic and then develop and share prevention programming on that topic. [[Ex. B, Rickert Depo. 42:1-8; Ashley Zukowski Affidavit](#).]

SADD provides a service-based learning experience for students that relates directly to the School’s curriculum, for health, interpersonal relations, and human development and wellness. [[Ex. B, Rickert Depo. 40:21-25](#).] Students in SADD prepare and make presentations to teachers, are part of the teacher professional development about the dangers of vaping and recognizing vaping activity. [[Ex. E, Ashley Zukowski Affidavit](#).] The students also prepare and make presentations about traffic safety, texting while driving, drinking while driving, healthy relationships, and cyber security. *Id.* Additionally, the students of SADD plan and present a traveling exhibit and program called “Hidden In Plain Sight,” which is designed to help parents of teens recognize unfamiliar hazards that are often in plain sight. *Id.* This includes an interactive exhibit of a simulated teenager's bedroom and explains areas and items of concern. *Id.*

3. *Bring Change to Mind*

Bring Change to Mind is a national organization designed to raise awareness around mental health with high school students. [[Ex. I, Samsun Hunckler](#).] In 2019-2020, two suicides hit the

School community and, the School obtained a CURES grant it assist in the recognition of mental illness, including identifying signs of a suicidal teen and provide coping skills and resources for treatment to prevent teen suicide. *Id.* When the grant ended, the School created a corporation-sponsored, student club for Bring Change to Mind that began with the 2020-2021 school year. *Id.*

Students in Bring Change to Mind complete service-based projects to advocate for and promote the adoption of healthy behaviors, which are directly related to the Indiana Health & Wellness curriculum and standards. *Id.* Students in Bring Change to Mind analyze the influence of family, peers, culture, media, technology and other factors on health behaviors. *Id.* The students focus on identifying and understanding the internal and external factors that can positively and/or negatively influence health and behaviors. *Id.* The students then create programs and events to advocate for and encourage others to adopt healthy behaviors. Students in Bring Change to Mind must design and write messages to communicate information in a persuasive way to their audience. *Id.*

By way of example, Bring Change to Mind has undertaken a project of capturing student and staff interviews of individuals sharing their struggle of mental health and explaining how they cope with day-to-day life in a positive way. *Id.* To accomplish this project, a student had to identify participants, schedule interviews, write questions for each interview, conduct the interview, and select video and audio clips to use in the final product. *Id.* The project is being made into a Public Service Announcement for the student body at Pendleton Heights High School. *Id.*

4. *Outdoor Adventure Club*

The Outdoor Adventure Club is a corporation-sponsored club directly related to the physical education curriculum. [[Ex. H, Eileen Neeley Affidavit.](#)] The physical education curriculum requires physical literacy, which is defined as “the ability to move with competence

and confidence in a wide variety of physical activities in multiple environments that benefit the healthy development of the whole person.” [Ex. N, Indiana Department of Education, INDIANA ACADEMIC STANDARDS FOR PHYSICAL EDUCATION, https://www.in.gov/doe/files/hs-pe-standards-revision-final-dec12-2017.pdf](#) The goal of physical education is to “develop physically literate individuals who have the knowledge, skills and confidence to enjoy a lifetime of healthful physical activity.” *Id.*

The Students who are members of the Outdoor Adventure Club participate in camping, horseback riding, rock climbing, skiing, hiking, canoeing, and spelunking. [\[Ex. B, Rickert Depo. 39:2-8.\]](#) The club focuses on healthful physical activities that a student is likely to engage in after high school. [\[Ex. H, Eileen Neeley Affidavit.\]](#) The objective of the Outdoor Adventure Club is to teach students the skills necessary to participate in physical activities, to teach them the benefits of those physical activities, and to promote competence and confidence in a variety of physical activities in multiple environments. *Id.*

5. Robotics

Robotics is a new corporation-sponsored club created and approved for the 2021-2022 school year. [\[Ex. B, Rickert Depo. 48:22-49:4.\]](#) In Robotics club, students learn how to program and operate robots. [\[Ex. F, Branden Jessie Affidavit.\]](#) The students who participate in Robotics design, build, and program a robot that is entered into competitions against other student designed, built, and programmed robots. *Id.* They apply their knowledge of engineering and computer science and specifically, the curriculum of the Principles of Engineering course. *Id.* Robotics is directly connected to the engineering and computer sciences curriculum. [\[Ex. B, Rickert Depo.49:9-12.\]](#) Students in Robotics build a robot, write and input computer commands to give the robot functions and movement, and they use their robot in local, national and international

tournaments. [[Ex. B, Rickert Depo. 49:14-18.](#)] Robotics provides a project-based learning experience that satisfies the employability skill graduation requirement. [[Ex. F, Branden Jessie Affidavit.](#)]

6. *Esports / Egaming*

Esports is a new corporation-sponsored club created and approved for the 2021-2022 school year. [[Ex. B, Rickert Depo. 48:22-49:4.](#)] Esports is directly connected to the computer sciences curriculum. [[Ex. B, Rickert Depo. 49:9-12.](#)] Students in Esports must learn and demonstrate understanding of movement concepts, principles, strategies and tactics as they apply to a specific game. [[Ex. G, Bryan Waltermire Affidavit.](#)] Additionally, students in Esports learn how to “shoutcast” which is the Esports version of sports broadcasting or announcing. *Id.* This is the first year for Esports, but the intention is to have this Esports club host a tournament, as is done by other local Esports clubs. *Id.* Like at other schools the tournament will be student organized and executed. *Id.* The students would be responsible for planning, designing, and implementing all aspects of the tournament from marketing, administrative, refereeing, content creating, and shout-casting. *Id.*

The School currently offers Introduction to Computer Science as part of its computer sciences curriculum. [[Ex. L, Rebecca Walls Affidavit.](#)] The Introduction to Computer Science class includes “Unit 3: interactive Animations and Games.” Unit 3 represents 50% of the Introduction to Computer Science curriculum, and the teacher is unable to fit in all the content she desires for that unit. *Id.* The objective of Unit 3 is for students to learn fundamental programming constructs and practices in the Javascript programming language while developing animations and games in Cord.org’s Game Lab environment. *Id.* The Unit requires students to design their own animations and games. *Id.* To accomplish that objective, students must understand how computers

represent data, including text, sound, images, and numbers, and must be able to create data visualizations, models, and simulations. *Id.*

Currently, the School only offers Introduction to Computer Science, but plans to expand its curriculum to include to next level of classes: Computer Science I and Computer Science II. Esports is increasing interest in the Computer Science curriculum to aid in the extension of the Computer Science curriculum in the upcoming school years. [[Ex. G, Bryan Waltermire Affidavit.](#)]

7. *FCA (Fellowship of Christian Athletes)*

FCA is not a corporation-sponsored club. [[Ex. B, Rickert Depo. 34:10-14.](#)] FCA meets at the School. *Id.* As a non-corporation sponsored club, FCA is not permitted to use the daily announcements or otherwise post information at the school about meetings. [[Ex. B, Rickert Depo. 53:8-20](#); *See also* [Ex. D, Axel-Adams Depo. 14:3-7](#) (changing his statement in his declaration about FCA advertising on bulletin boards).]

III. Preliminary Injunction Standard

A request for a preliminary injunction requires the Court to weigh the following factors: (1) whether the movant has a reasonable likelihood of success on the merits; (2) whether the movant's traditional remedies at law are inadequate, thus causing a threat of irreparable harm pending the resolution of the substantive action if the request for injunctive relief is denied; (3) whether the threatened injury to the movant outweighs the threatened harm the granting of an injunction may inflict on the respondent; and (4) whether the public interest would be disserved by the granting of an injunction. *See Judge v. Quinn*, 612 F.3d 537, 546 (7th Cir. 2010) (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 129 S.Ct. 265, 374 (2008)).

IV. Legal Argument

The School does not prohibit the GSA from meeting at the School. Access for meetings is not the issue in this case. Rather, the GSA contends that it is not given access to certain methods of communication about its meetings or activities. Thus, the issue before the Court is whether the School provides the GSA equal access to the modes of communication provided to noncurricular related groups.³ As shown below, the GSA is provided the same access as is provided to other noncurricular groups. There is no evidence that noncurricular groups receive more extensive use of communication methods at the School. To the contrary, the evidence is that the School only allows curricular related groups a listing in the Student Handbook, use of the bulletin boards, and access to the afternoon announcements.

The GSA seeks an injunction which would immediately require the School to allow the GSA to be listed in the Student Handbook and to be given access to bulletin boards and afternoon announcements via the School radio. However, if such an order is entered, the School would be required to provide the GSA with *greater* access than is provided to other noncurricular clubs. The GSA's claim rests upon the Equal Access Act ("EAA"). The EAA provides for *equal* access as provided to noncurricular student groups; it does not require *greater* access than other noncurricular clubs. Likewise, it does not require that once the school opens its doors for meetings by noncurricular student groups that it must also open its bulletin boards, PA system, official publications, or other means of communication or publicity.

The evidence shows that the School has not granted noncurricular student groups permission to be listed in the Student Handbook, to advertise on the school bulletin boards, or to

³ For purposes of this Motion, the GSA does not contend that it is considered a curricular related student led group. As such it is treated as a noncurricular related group for analysis under the EAA.

be on the afternoon announcements. As such, the GSA is not seeking equal access. Rather, it is asking the Court to expand its access and open the School to postings, flyers, and announcements that have not previously been allowed. The GSA has been provided access to the School on the same terms and conditions as other noncurricular student groups. As such, it has equal access as provided for in the EAA. The GSA's request for injunctive relief should be denied.

A. The GSA will not prevail on the merits of its claim because non-curriculum related clubs are not provided greater access than the GSA.

1. The requirements of the Equal Access Act.

Under the Equal Access Act, a public secondary school with a "limited open forum" is prohibited from discriminating against students who wish to conduct a meeting within that forum on the basis of the "religious, political, philosophical, or other content of the speech at such meetings." 20 U.S.C. §§ 4071(a) and (b). Specifically, the Act provides:

"It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings."

20 U.S.C. § 4071(a).

A "limited open forum" is created when the school "grants an offering to or opportunity for one or more noncurricular related student groups to meet on school premises during noninstructional time." 20 U.S.C. § 4071(b). If the School allows a noncurricular related student group to meet, the EAA's obligations are triggered "and the school may not deny other clubs, on the basis of the content of their speech, equal access to meet on school premises during noninstructional time." *Bd. of Educ. of Westside Cmty. Sch. v. Mergens By & Through Mergens*, 496 U.S. 226, 236, (1990).

2. *The limited open forum created by the School is for meetings, not publicity.*

The School allows noncurricular related student groups to meet at the School, including the GSA. As such, the School has created a limited open forum for purposes of allowing meetings. However, opening the school building for meetings does not require opening the School for publicity of such meetings or the activities of those groups. Nothing in the EAA provides that once a school opens its doors for meetings, it must also open its communication systems and official documents to material and promotion of noncurricular groups. *See generally* 20 U.S.C. § 4071.

The GSA cites to *Bd. of Educ. of Westside Cmty. Sch. v. Mergens By & Through Mergens*, 496 U.S. 226, 247 (1990) for the suggestion that the EAA requires “official recognition” of noncurricular clubs including allowing those clubs “access to the school newspaper, bulletin boards, the public address system, and the annual Club Fair.” [[Filing No. 10, at ECF p.12](#)]. However, that quote is taken out of context. The Court in *Mergens* noted that such official recognition and access was only required to provide the club at issue *equal* access that had already been provided to other noncurricular clubs. *See Mergens*, 496 U.S. at 247. Thus, the threshold issue that must be decided is whether the School has allowed other noncurricular student groups access to the Student Handbook, bulletin boards, and the afternoon announcements.

3. *Noncurricular student groups are not allowed a listing in the Student Handbook.*

The School has not allowed noncurricular student groups a listing in the Student Handbook, and thus the EAA does not require that the GSA be listed in the Student Handbook. In its Brief, the GSA identifies the following groups that are listed in the Student Handbook, which groups, the GSA contends are noncurricular groups: Mat Maids, Best Buddies, SADD, and Outdoor Adventure Club. [[Filing No. 10, at ECF p. 3.](#)] However, each of those groups are curricular related

and access provided to those groups is not required to be provided to the GSA or other noncurricular student groups.

a. Mat Maids

Mat Maids is listed in the Student Handbook, but it is not an actual group or entity. Mat Maids does not exist and has not existed at Pendleton Heights in at least the last 14 years. [[Ex. B, Rickert Depo p. 60:8-11](#) (showing Principal Rickert has been at the school for 14 years); and [Rickert Depo. 22:14-23:4.](#)] Mat Maids is in the Student Handbook by mistake. It is not a student led curricular group. In fact, Mat Maids is not a group at all; it does not exist and is thus a non-entity.

The mistaken inclusion of a non-entity in the Student Handbook does not open the door to require inclusion of all non-entities in the Student Handbook. Likewise, it does not open the door to require inclusion of noncurricular groups in the Student Handbook. The EAA requires equal access. Listing the GSA in the Student Handbook because a non-existent group was previously listed, does not provide “equal access” to the GSA because Mat Maids was given no benefit or unequal opportunity.

b. Best Buddies

Best Buddies is a curricular related student group. Best Buddies is directly related the curriculum taught in two courses at Pendleton Heights High School: Interpersonal Relationships and Essential Skills Cadet Teaching. Additionally, Best Buddies is directly related to the curriculum as it provides the service-based learning experience that is one way of satisfying the Employability Skills graduation requirement.

i. Interpersonal Relationships

“Interpersonal Relationships is an introductory course “that “addresses knowledge and skills needed for positive and productive relationships in career, community, and family settings.” Ex. O, INDIANA DEPARTMENT OF EDUCATION ACADEMIC STANDARDS COURSE

FRAMEWORK, Interpersonal Relationships

https://www.doe.in.gov/sites/default/files/standards/cte-family-and-consumer-sciences/cf-fcs-interpersonalrelationships_8-1-14.pdf The “[m]ajor course topics” taught in Interpersonal

Relationships include “communication skills; leadership, teamwork, and collaboration; conflict prevention, resolution, and management; building and maintaining relationships; and individual needs and characteristics and their impacts on relationships.” *Id.* “A project-based approach that utilizes higher order thinking, communication, leadership, and management processes, and fundamentals to college and career success is recommended in order to integrate these topics into the study of interpersonal relationships.” *Id.* “Service learning and other authentic applications are strongly recommended.” *Id.*

One of the key foundational principals of Best Buddies is providing project-based opportunities for students to apply the major course topics of Interpersonal Relationships. The students of Best Buddies plan, organize, and implement five programs or events that that are designed around a partnership with general education students and essential skills students. Each program or event requires the student members to use the major topics taught in Interpersonal Relationships – communication, collaboration, management, building and maintaining relationships, and determining the individual needs of the buddy relationship.

ii. Essential Skills Cadet Teaching

The Best Buddies program is a directly related to the Essential Skills Cadet Teaching class that is taught at Pendleton Heights. That course is designed with the same foundation as Best

Buddies – peer-to-peer, hands-on interaction, mentoring and modeling behaviors by general education students to essential skills students. [\[Ex. K, Riley Herrin Affidavit.\]](#) The activities of Best Buddies provide an extension of the Cadet Teaching Class by allowing for more one-on-one peer mentoring. A key standard in the curriculum for the Cadet Teaching class is, “You are meant to be strong role models to the essential skills students.” Best Buddies events implement that same key standard because during all Best Buddies events, general education students teach speaking skills to the essential skills students by modeling appropriate communication and speaking skills, modeling appropriate behaviors in different social settings, and providing hands-on instruction for completing life skills. [\[Ex. K, Riley Herrin Affidavit.\]](#)

iii. Employability Skills – Service Based Learning graduation requirement

Beginning July 1, 2019, every Indiana school was required to include “interdisciplinary employability skills standards” in the school’s curriculum. *See* Ind. Code § 20-30-5-14. The employability skills standards are established by the Indiana Department of Education, in conjunction with the Department of Workforce Development, approved by the State Board of Education, in the school’s curriculum. *See Id.* Employability skills are now a mandatory curriculum at all schools and for students graduating in 2023 and thereafter, Employability skills is a graduation requirement. *See Id.* (located in Chapter 5 titled “Mandatory Curriculum”); see also I.C. § 20-32-4-1.5(b) (establishing the graduation requirements beginning with the 2022-2023 school year).

To earn a high school diploma, students in the graduating class of 2023 must do more than have sufficient courses and credit. They must also satisfy the requirement to “learn and demonstrate employability skills” and “Postsecondary-Ready Competencies.” *See* INDIANA STATE BOARD OF EDUCATION, *Graduation Pathways Policy Guidance (finalized July 11, 2018)*;

<https://www.in.gov/doi/students/graduation-pathways/>. To “learn and demonstrate employability skills,” a student must participate in a “locally developed program” and complete one of the following: (1) Project-Based Learning Experience; (2) Service-Based Learning Experience, or (3) Work-Based Learning Experience.” *Id.* at Section A-1. Whichever pathway the student chooses to satisfy the Employability Skills requirement, “the experience must allow the student to demonstrate employability skills beyond the classroom.” *Id.* at Section C-4. For a starting point the State Board of Education provided a non-exhaustive list of potential issues for Service-Based Project Learning, as follows:

<ul style="list-style-type: none"> • Bullying prevention • Career development • Civic engagement • Community development • Community gardens • Days of service (Global Youth Service Day, Martin Luther King, Jr. Day, etc.) • Disaster services • Diversity and cultural awareness • Dropout prevention 	<ul style="list-style-type: none"> • Economic opportunity and development • Education • Environmental stewardship • Health and wellness • Historic preservation • Homelessness • Human rights • Hunger • Immigrant and migrant populations 	<ul style="list-style-type: none"> • Intergenerational disparities • Justice • Mentoring • Peace • Pregnancy prevention • School climate • Substance abuse prevention • Tutoring • Veterans and military families • Violence prevention • Voting
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Id. at Section b-3.

The Service-Based Learning can be completed individually or in groups. *Id.* at b-5. The student’s Service-Based Learning “can include school involvement, such as co-curricular or extracurricular activities,” and schools “have the local decision making authority [to determine] if club sports or activities outside-of-school can fulfill this requirement.” *Id.* at b-7. “Students must own the experience, which can be demonstrated through planning, organizing, implementing,

participating, and evaluating the activities, objectives, events, and/or practices of their sport and co-curricular and extracurricular programs.” *Id.* at b-7. To provide guidance to schools, the State Board of Education has identified certain extracurricular activities that “have service as one of their primary objectives” and “allow students to be engaged both in a school-based activity and meaningful service.” Those include:

<ul style="list-style-type: none"> • 4-H • Beta Club • Big Brothers/Big Sisters • Distributive Education Clubs of America • Eagle Scouts • Family, Career, Community Leaders of America • Future Farmers of America 	<ul style="list-style-type: none"> • Health Occupation Students of America • Key Club • Peer Educating Peers (P.E.P) • SkillsUSA • Students Against Destructive Decisions • Student Council/Student Government • VOICE
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Id. at b-7.

With the new graduation standards, the concept of what is curricular related in Indiana is broader than just courses and credit hours. The curriculum and course of study at every Indiana school now includes employability skills. A club that is service oriented and provides for projects or programs for students “planning, organizing, implementing, participating, and evaluating the activities, objectives, [or] events” is curriculum related as the Indiana Board of Education has mandated such service-based learning experience for students to graduate.

Here, Best Buddies is directly curricular related because it provides mentoring to essential skills students and requires students to plan, organize, implement, participate in, and evaluate activities and events. The inclusion of Best Buddies in the Student Handbook is consistent with the policy of listing curricular related clubs.

c. SADD

SADD is a curricular related student group. SADD is directly related the curriculum taught in two courses at Pendleton Heights High School: Health and Wellness and Interpersonal Relationships. Additionally, SADD is directly related to the curriculum as it provides the service-based learning experience that is one way of satisfying the Employability Skills graduation requirement.

i. Health and Wellness

The Indiana Standards for Health and Wellness require that “Reading for Literacy in Technical Subjects (i.e., Health & Wellness).” [[Ex. E, Ashley Zukowski Affidavit.](#)] Students must develop the skills that allow them to read complex informational health texts, build an understanding of domain-specific words and phrases, and develop the capacity to evaluate detailed arguments, synthesize complex information and follow detailed descriptions and procedures. *Id.* Students need to be able to gain knowledge from challenging texts that make use of elaborate diagrams and data to convey information and illustrate concepts. *Id.* The Indiana Department of Education Standards for Health and Wellness curriculum also require students to demonstrate the ability to use interpersonal communication skills to enhance health and avoid or reduce health risks. *Id.* That standard focuses on how responsible individuals use verbal and non-verbal skills to develop and maintain healthy personal relationships. *Id.* The ability to organize and to convey information and feelings is the basis for strengthening interpersonal interactions and reducing or avoiding conflict. *Id.* Students must demonstrate organize and convey information for strengthening interpersonal relationships.

SADD’s primary focus is providing educational programs and information to students, teachers, and community members about risky or dangerous behaviors, and promoting good choices and a healthy lifestyle. Students in SADD make, organize, and present educational

programs addressing risky behaviors such as substance abuse, texting while driving, and relationships with peers through online activity.

ii. Interpersonal Relationships

As shown above, under discussion of Best Buddies, “Interpersonal Relationships” is a course taught at Pendleton Heights where the major course topics include communication skills; leadership, teamwork, and collaboration; conflict prevention, resolution, and management; building and maintaining relationships; and individual needs and characteristics and their impacts on relationships, and which strongly recommends applying those lessons learned in a “service learning” setting. The primary focus and activities of SADD are directly related to the following State mandated standards for the Interpersonal Relationships course:

a. Integration of Knowledge and Ideas

RT.7 - Translate quantitative information expressed in words in a text into visual form (e.g., a table or chart) and translate information expressed visually or mathematically (e.g., in an equation) into words.

b. Research to Build and Present Knowledge

WT.7 – Conduct short as well as more sustained research projects to answer a question (including a self-generated question) or solve a problem; narrow or broaden the inquiry when appropriate; synthesize multiple sources on the subject, demonstrating understanding of the subject under investigation.

WT.8 – Gather relevant information from multiple authoritative print and digital sources, using advanced searches effectively; assess the usefulness of each source in answering the research question; integrate information into the text selectively to maintain the flow of ideas, avoiding plagiarism and following a standard format for citation.

c. Standard 1: Students will comprehend concepts related to health promotion and disease prevention to enhance health.

HW.1.4 Examine the impact that genetics can have on personal health.

Example: Examine personal health-related actions that can reduce the risk and/or delay the onset of potential genetic and family health problems.

HW.1.5 Formulate ways to prevent or reduce the risk of health problems.

Example: Identify and develop approaches to educate peers (adolescents) about risk reduction (e.g., teen pregnancy, suicide, bullying, abuse, etc.).

HW.1.7 Summarize the benefits and barriers to practicing healthy behaviors.

Example: Construct a list of practices to reduce and/or prevent stress and identify ways to overcome barriers.

HW.1.8 Predict susceptibility to injury or illness if engaging in unhealthy behaviors.

Example: Investigate adolescent risk behaviors which could lead to injury or illness.

d. Standard 2: Students will analyze the influence of family, peers, culture, media, technology and other factors on health behaviors.

HW.2.3 Examine how adolescents influence healthy and unhealthy behaviors.

Example: Examine how peers can positively or negatively influence others regarding the use of anti-social words and actions.

HW.2.4 Assess how the school and community can influence health practices and behaviors.

Example: Assess programs (“Prom Promise”, “Don’t Drink and Drive,” “White Lies,” etc.) that can help students identify, avoid or cope with potentially dangerous situations.

HW.2.5 Analyze the effect of media on personal health.

Example: Compare and contrast how media can send messages about behaviors that can have a positive or negative effect on personal health and wellness.

HW.2.6 Analyze the impact of technology on personal and family health.

Example: Examine how technology can have adverse effects on personal and family health (e.g., Internet pornography, chat lines, inaccurate health information).

HW.2.7 Examine how norms influence health-related behaviors.

Example: Recognize how perceived norms may not reflect actual health behaviors (e.g., teen alcohol use, tobacco use, sexual activity, dating, regular physical activity, etc.).

HW.2.9 Examine how some health risk behaviors can influence the likelihood of taking part in other unhealthy behaviors.

Example: Debate how using tobacco can increase the risk of using marijuana and/or describe how using alcohol can lead to poor decision making.

- e. **Standard 3: Students will demonstrate the ability to access valid information and products and services to enhance health.**

HW.3.4 Examine when professional health services may be required.

Example: Identify when eating habits and/or weight loss techniques may not be having a positive effect on the body and that professional health services are recommended.

- f. **Standard 4: Students will demonstrate the ability to use interpersonal communication skills to enhance health and avoid or reduce health risks.**

Effective communication enhances personal, family, and community health. This standard focuses on how responsible individuals use verbal and non-verbal skills to develop and maintain healthy personal relationships. The ability to organize and to convey information and feelings is the basis for strengthening interpersonal interactions and reducing or avoiding conflict. Students demonstrate refusal, negotiation and collaboration skills to enhance health and avoid or reduce health risks. Students organize and convey information and feelings for strengthening interpersonal [relations].

SADD is a cross curricular club that is directly related to both the Health and Wellness curriculum and Interpersonal Relationships curriculum. The students in SADD must read and evaluate health text, synthesize the information, and develop and present arguments to support healthy lifestyles and choices. By participating in the activities of SADD students demonstrate a deeper learning for the subject beyond the classroom and they build leadership skills, such as teamwork, communication, problem solving, critical thinking, and citizenship, all of which are directly related to the curriculum of Health and Wellness and Interpersonal Relationships.

iii. *Employability Skills – Service Based Learning*

As discussed above, clubs that satisfy the employability skills graduation requirement by providing service-based learning are directly related to the curriculum of the School. SADD is curricular related because it requires students to apply academic knowledge to its service experience by reflecting on the larger societal issues of substance abuse, texting while driving, and relationships with peers through online activity, and collaborating with students, teachers, and the

community to address those issues. Students in SADD must plan, organize, implement, participate in, and evaluate those educational service activities and events. The Indiana Board of Education has specifically identified SADD as an extracurricular activity that has “service as one of [its] primary objectives” which could be used to satisfy the service-based learning requirement. See Ex. M, INDIANA STATE BOARD OF EDUCATION, *Graduation Pathways Policy Guidance (finalized July 11, 2018)*; <https://www.in.gov/doe/students/graduation-pathways/> at b-7 (referring to SADD by its full name “Students Against Destructive Decisions”). Additionally, the State Board of Education as identified the topics on which SADD presents as appropriate issues for serviced based projects. *Id.* at b-3 (identifying bullying prevention, health and wellness, and substance abuse prevention as issues for Service Based Learning projects.)

SADD is curricular related, and the inclusion of SADD in the Student Handbook is consistent with the policy of listing curricular related clubs.

d. Outdoor Adventure Club.

Outdoor Adventure Club is directly related to the curriculum of physical education taught at Pendleton Heights High School. The Indiana Department of Education has developed the “Academic Standards for Physical Education” that must be employed in all physical education curriculums in Indiana Schools. See Ex. N, INDIANA DEPARTMENT OF EDUCATION, *Academic Standards for Physical Education, (2017)* <https://www.in.gov/doe/files/hs-pe-standards-revision-final-dec12-2017.pdf>.

As stated in the Department of Education’s standards, “Physical education is an academic discipline that involves the study of human movement and its impact on health and quality of life.” *Id.* at Introduction. “Physical education in schools provides all students access to a standards-based sequence of learning which promotes health and physical literacy, as well as the motivation to

engage in the health-enhancing physical activity needed to achieve and maintain a balanced, healthy life *over a lifetime.*” *Id.* (emphasis added). Indiana’s physical education curriculum standards specifically state, “The **goal of physical education** is to develop **physically literate** individuals who have the knowledge, skills and confidence to enjoy a lifetime of healthful physical activity.” *Id.* (emphasis in original). The physical education curriculum requires physical literacy, which the State has defined as “the ability to move with competence and confidence *in a wide variety of physical activities in multiple environments* that benefit the healthy development of the whole person.” *Id.* (emphasis added).

The Outdoor Adventure Club is directly related to the physical education curriculum in that it teaches students the skills necessary to participate in a variety of physical activities, teaches the benefits of being involved in various types of physical activities, and encourages students to participate regularly in physical activity as part of a healthy lifestyle. The physical education curriculum calls for a “wide variety of physical activities” that are conducted in “multiple environments.” The Outdoor Adventure Club provides a wide variety of physical activities – hiking, camping, horseback riding, canoeing, rock climbing, hiking, spelunking, and skiing – in multiple environments (on trails, in the forest, on mountains, in caves, and on creeks and lakes).

Outdoor Adventure Club is curricular related, and the inclusion of Outdoor Adventure Club in the Student Handbook is consistent with the policy of listing curricular related clubs.

4. *Noncurricular student groups are not allowed to post on bulletin boards or be in the afternoon announcements.*

The School has not allowed noncurricular student groups to post items on the bulletin boards or be in the afternoon announcements. In its Brief, the GSA identifies only the Outdoor Adventure Club as a noncurricular student club that has advertised in the afternoon

announcements. [[Filing No. 10, at ECF p. 13](#)] But the GSA argues that “other noncurricular groups” are “given access to advertising” at school without identifying those “other noncurricular groups.” *Id.*

The School Principal has testified under oath that only corporation sponsored clubs are allowed to post on bulletin boards or be on the afternoon announcements. All corporation sponsored clubs are, by definition, curricular related clubs. [*See* [Ex. C, Policy 2430.](#)] As shown above, the GSA had not identified any club in its Brief that is not directly related to the curriculum at Pendleton Heights High School, except for the Mat Maids – which is not a club, but a typo.

The GSA has not identified any noncurricular related group that has been listed in the Student Handbook, allowed to post on bulletin boards, or allowed to be in the afternoon announcements. As such, the GSA has not identified any noncurricular student group that has been provided access to the School on terms and conditions more favorable than that which the GSA has been provided. There is no evidence in the record to support the assertion that the GSA has been denied equal access or a fair opportunity to, or otherwise discriminated against, on the basis of the religious, political, philosophical, or other content of the speech at such meetings. There is no evidence that the GSA has been denied equal access as provided for in the Equal Access Act. The GSA has not met its burden of showing that it is likely to succeed on the merits. The GSA’s request for a preliminary injunction should be denied.

B. All other factors relevant to a request for a preliminary injunction analysis

As shown above, the GSA is not likely to prevail on the merits of its claim. The other factors do not weigh in favor of the GSA, either.

The GSA will not suffer irreparable harm. The issue is not access for meeting, but access for publicizing the organization. The GSA has plenty of other means of advertising itself, such as

through social media. Other noncurricular groups – such as Pendleton Rugby club – have not been permitted to use the school announcements or the bulletin boards – but have not been irreparably harmed by advertising or spreading the word using other methods or modes that reach the same, similar, or bigger audience.

The balancing of the harms does not weigh in GSA’s favor as it asserts, in part because the GSA mischaracterizes the harm the School would suffer. The GSA assumes that the only harm would be “effort or expense” of allowing the GSA to advertise. [[Filing No. 10, at ECF p. 20.](#)] That is inaccurate. As the Principal has said all along, if one noncurricular group is allowed to advertise on the announcements or bulletin boards, all noncurricular groups must be allowed to do so. Thus, the real harm is that the 2-3 minute afternoon school announcements will become much longer and unmanageable with unlimited noncurricular-related organization; the three bulletin boards in the school will be covered with flyers for noncurricular-related organizations; and the Student Handbook would be required to be immediately reprinted in the middle of the school year to add not just the GSA, but any other noncurricular club that wants to be listed. Moreover, the public interest is not served by forcing a school to open access to its afternoon announcements, bulletin boards, and Student Handbook to all noncurricular organizations.

The GSA has not satisfied any of the factors that need to be taken into consideration at the preliminary injunction stage. As such, its Motion should be denied.

V. Conclusion

For the forgoing reasons, Plaintiff’s Motion for a Preliminary Injunction should be denied.

Date: December 10, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of December 2021, a true and exact copy of the foregoing was filed electronically via the Court's Electronic filing system. Notice of this filing was sent to the following persons by operation of the Court's Electronic filing system.

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